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No. 90-159 (2)

IN THE

Supreme Court of the United States

October Term, 1990

TOWN OF BABYLON

and

TOWN OF HEMPSTEAD,

Petitioners,

- against -

NATIONAL ADVERTISING COMPANY, INCORPORATED VILLAGE OF LINDENHURST, TOWN OF OYSTER BAY, INCORPORATED, VILLAGE OF FREEPORT, and TOWN OF ISLIP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT NATIONAL ADVERTISING COMPANY'S BRIEF IN OPPOSITION

MYRON D. COHEN
(COUNSEL OF RECORD)
HUNTON & WILLIAMS
100 PARK AVENUE
NEW YORK, NEW YORK 10017
(212) 309-1000

OF COUNSEL:
CHRISTOPHER M. MASON
MICHAEL R. SHEBELSKIE

Attorneys for Respondent National Advertising Company

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QUESTION PRESENTED FOR REVIEW

Does a municipality seeking to uphold an ordinance restricting constitutionally protected speech carry its burden of justifying that restriction when it offers neither statutory nor extrinsic evidence of any governmental interest the ordinance may have been intended to advance?

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LIST OF AFFILIATED CORPORATIONS

Minnesota Mining and Manufacturing ("3M") Company is the parent corporation of National Advertising Company. National Advertising Company does not have any subsidiary companies.

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COUNTER-STATEMENT OF THE CASE

This case involves the patent unconstitutionality of sign ordinances of the New York towns of Babylon and Hempstead ("Petitioners") restricting "off-premises" advertising. National Advertising Company ("National"), believing that both ordinances contained the constitutional infirmities afflicting the billboard ordinance reviewed by this Court in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), filed a complaint under 42 U.S.C. § 1983 seeking a declaratory judgment and permanent injunction against the enforceability of each ordinance.

Neither ordinance gave any indication of the governmental interests it sought to advance. Moreover, despite the opportunity afforded by a hearing on a preliminary injunction and a subsequent request by the district court for additional submissions upon conversion of the motion into one for summary judgment, neither Petitioner offered any extrinsic evidence that it actually intended to advance any governmental interest when it passed its ordinance.

The Second Circuit, having been asked to review the propriety of the district court's entry of judgment against the Petitioners, concluded that they had failed to meet the burden of justifying the restrictions upon commercial speech imposed by their ordinances. The court of appeals accepted the Petitioners' contention that aesthetics and traffic safety—when viewed in the abstract—were legitimate governmental interests; nonetheless, it held that it could not assume, in the absence of any positive evidence, that the Petitioners actually sought to advance those interests by restricting constitutionally protected speech.

SUMMARY OF ARGUMENT

The Petitioners' sign ordinances are unconstitutional under the principles enunciated by this Court in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). Those ordinances discriminate against non-commercial speech in favor of commercial speech. They also contain content-based exceptions to the general ban on outdoor advertising for certain types of non-commercial speech. Furthermore, Petitioners never presented evidence of any governmental interests those ordinances were intended to advance. The invalidation of those ordinances by the lower courts, therefore, was consistent with the uniform holdings of this Court and the circuit courts of appeals.

REASONS FOR DENYING THE WRIT

POINT I

THERE IS NO CONFLICT BETWEEN THE FEDERAL CONSTITUTIONAL QUESTIONS DECIDED BY THE COURTS BELOW AND THE APPLICABLE DECISIONS OF THIS COURT.

It is well-established that municipalities must justify their ordinances when they substantially restrict constitutionally protected speech. *See, e.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72 (1981); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 570 (1980); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977).

In the case at bar, the sign ordinances of the Petitioners mirror the ordinance struck by this Court in *Metromedia*: commercial on-premises signs are allowed; non-commercial off-premises messages are prohibited. *Compare with Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513-14 (1981). Moreover, the exemptions to the ordinances' restrictions, like those before this Court in *Metromedia*, require examination of the content of non-commercial messages. In most instances, whether off-premises non-commercial signs are exempted or prohibited turn on whether or not they convey messages approved by the ordinances.[1] *Compare with id.* at 514.

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[1] Babylon's sign ordinance provides that the only type of ground signs allowed are those which advertise a product or service offered by a business or industry located at the premises on which the sign is erected, *i.e.*, on-premises commercial signs. BABYLON, N.Y., CODE art. XIX, §§ 213-253(G)(1) and (2), 213-255(C)(1). In addition, Babylon's sign ordinance contains exceptions to its general ban on

Thus, as the Second Circuit declared in its decision below, "this case is really quite simple. [The] challenged ordinances are unconstitutional because they fail to follow basic constitutional dictates concerning a municipality's ability to restrict speech." *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 555 (2d Cir. 1990); Exhibit A at A-8.[2]

In addition to the basic infirmities revealed by the inability of the drafters of the Petitioners' sign ordinances to comply with the principles of *Metromedia*, the Petitioners themselves, in their defense to the allegations of the complaint at bar, offered no justification for the ordinances, either by way of a stated legislative purpose or by extrinsic evidence of any governmental interest sufficient to uphold the restrictions upon protected speech. This failure is crucial, because under the test this Court set forth in *Central Hudson* and *Metromedia*—the test that the courts below applied to Petitioners' ordinances—the Petitioners have the burden of demonstrating the governmental inter-

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non-commercial advertising in favor of a few types of non-commercial speech. For example, temporary political campaign signs and temporary signs advertising annual or semi-annual events of non-profit organizations are permitted. *Id.* at §§ 213-253(Q)(1), 213-255(A).

Hempstead's sign ordinance authorizes ground signs subject to the proviso that they advertise only the business, products or services provided on the premises. HEMPSTEAD, N.Y., BUILDING CODE ORDINANCE art. XXIV, § 244(F)(2)(a) & (b). Hempstead's ordinance also contains content-based restrictions for certain types of non-commercial speech. For example, it allows the erection of a "religious sign" as well as informational signs "displayed for the safety of the public" and certain mobile "political" signs. *Id.* at § 244(A)(1)(b), (A)(1)(f)[1], (F)(2)(h)[2].

[2] References to the exhibits accompanying the Petition for Writ of Certiorari will be designated as "Exhibit" followed by the appropriate exhibit letter.

ests served by their legislation.[3] Thus, as this Court said in *In re R.M.J.*, 455 U.S. 191, 206 (1982), "[W]e deal with a silent record." (regulation of commercial speech invalid where record silent with respect to governmental interests sought to be advanced).

The district court first found that there was no reason to doubt that the speech at issue here concerned lawful activity and was not misleading. *National Advertising Co. v. Town of Babylon*, 703 F. Supp. 228, 234 (E.D.N.Y. 1989); Exhibit B at B-12. The district court then found that Petitioners failed to meet their burden under the *second* prong of the *Central Hudson* test. That is, since Petitioners had not included any precise statement of purpose in their sign ordinances and did not, in the alternative, present any other evidence to the court to establish the objectives underlying the ordinances, the court could not determine that their ordinances sought to promote substantial government interests. *Id.* at 235; Exhibit B at B-12 to -13. The district court accordingly struck down Petitioners' ordinances. *Id.*; Exhibit B at B-12 to -13. The court of appeals agreed with the district court and upheld its decision as to Petitioners in its

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[3] This Court has established a four-part test that governmental entities must satisfy in order to justify ordinances that restrict commercial speech:

1. To warrant protection under the First Amendment, the speech must not concern an unlawful activity or be misleading;
2. If the speech warrants First Amendment protection, the ordinance must seek to implement a substantial governmental interest;
3. The ordinance must directly advance that interest; and
4. The ordinance must be narrowly drawn to accomplish the asserted governmental objective.

Metromedia, above, 453 U.S. at 507; *Central Hudson*, above, 447 U.S. at 563-66.

entirety. *National Advertising*, above, 900 F.2d at 556; Exhibit A at A-8 to -10.

None of the decisions of this Court cited by the Petitioners is to the contrary. Petitioners cite to several decisions of this Court that they claim compel the conclusion that the courts below failed to apply the correct test to review their ordinances. None of those decisions, however, holds that a court, in the absence of evidence, can take judicial notice of the alleged purposes which led to the enactment of legislation affecting basic constitutional rights. Only one of them, *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), comes close to touching on the precise question involved here.

In *Posadas*, this Court rejected a First Amendment challenge to a Puerto Rico statute that prohibited local casinos from advertising to Puerto Ricans. Even though the statute contained no precise statement of its purpose, this Court determined that the Puerto Rico legislature had enacted it to serve a legitimate governmental interest. *Id.* at 341.

This Court, however, did not make the determination in *Posadas* on a blank slate. First, the record in that case showed that the local Puerto Rico courts had found that the legislature had intended the statute to discourage gambling among the local population. *See id.* at 334. Because of Puerto Rico's unique cultural and legal status, this Court held that special deference should be given to those findings. *See id.* at 339 n.6. Second, the record contained extrinsic evidence of the governmental interest behind the statute in the form of an admission by the party challenging the statute, conceding that the legislature had intended to keep Puerto Ricans away from casinos by passing the statute. *See id.* at 341.

In contrast, the ordinances at issue here are not statutes of a government such as Puerto Rico with a unique relation to the federal system. Nor does the record below contain any admission against interest—or any other extrinsic evidence—of any proper governmental purpose to the ordinances. Thus, Petitioners' argument based on an alleged conflict with *Posadas* should be rejected by this Court.

Likewise, this Court should reject Petitioners' contention that the Second Circuit's decision is inconsistent with *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1989). In *Renton*, the legislation at issue "by its terms" indicated that it was enacted to prevent crime, protect the city's retail trade and maintain property values. *Id.* at 48. Thus, this Court, as in *Metromedia*, could look to the statute itself for the expression of legislative purpose behind its enactment.

In this case, however, there is no evidence in the record to establish what considerations led Petitioners to enact their sign ordinances. Consequently, there is no indication that the experiences of other municipalities—as relied upon in *Renton*—were ever brought to the attention of the framers of the ordinances.

The courts below properly placed the burden on Petitioners to demonstrate the legitimate governmental interests served by their restriction of First Amendment activity. Petitioners apparently feel that they did not have to comply with that requirement. Plaintiffs obstinately refuse to recognize, however, that:

> [T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment. In order for a reviewing court to deter-

> mine whether a zoning restriction that impinges on free speech is "narrowly drawn [to] further a sufficiently substantial government interest," . . . the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed as *de minimis*."

Schad, above, 452 U.S. at 77 (Blackmun, J., concurring) (citation omitted). Ignoring that command from this Court, Petitioners never introduced any evidence to satisfy the *Central Hudson* test. The Petition for Writ of Certiorari, therefore, should be denied.

POINT II

THERE IS NO CONFLICT AMONG THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS ON THE ISSUE RAISED BY PETITIONERS.

In addition to arguing that the Second Circuit did not follow the precedents of this Court, Petitioners argue that the Second Circuit's decision, along with the Eleventh Circuit's decision in *Dills v. Marietta*, 674 F.2d 1377 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983), diverges so substantially from the approach of the other United States circuit courts of appeals on First Amendment questions that "the very foundation of our system of jurisprudence" is put at risk. Pet. at 15. That argument lacks support even in the cases upon which Petitioners rely.[4]

Like the Second Circuit here, the Eleventh Circuit in *Dills* applied the principles of *Central Hudson* and *Metromedia*. In that case, the Eleventh Circuit held that, although the statement of purpose in Marietta's sign ordinance supported counsel's claim that the city intended the ordinance to promote traffic safety, counsel's claim that the city also intended the ordinance to promote aesthetics had to be rejected. The court reached that conclusion because the ordinance's statement of purpose did not support that claim and because counsel offered no extrinsic evidence to show such intent. *Dills*, above, 647 F.2d at 1381.

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[4] Petitioners also claim that the Second Circuit's decision conflicts with decisions of the Court of Appeals of the State of New York. Pet. at 12. Petitioners cite to no decisions of the latter court. Accordingly, National need not discuss that issue.

Thus, far from "pass[ing] beyond any stated purpose and delv[ing] into the hearts and minds of the legislators who voted for the statute to ascertain their true motivation," Pet. at 14, the Eleventh Circuit, in the absence of a stated purpose or extrinsic evidence, simply refused to speculate or allow counsel to speculate on additional interests the city might have intended to serve with its ordinance.

In similar fashion, the court in *Adams Outdoor Advertising of Atlanta, Inc. v. Fulton County, Georgia*, 738 F. Supp. 1431 (N.D. Ga. 1990), struck in its entirety an ordinance prohibiting all off-premises signs in the absence of any evidence of the governmental interests that the county sought to advance in enacting the measure. The court declared:

> Like the Eleventh Circuit, this court cannot permit defendant to justify its restriction of protected speech with after the fact invocations of esthetics and traffic safety. Absent any evidence that these concerns actually contributed to the passage of defendant's ordinance, the court finds that it fails to satisfy the second part of the *Central Hudson* test and must be declared unconstitutional.

Id. at 1433. Thus, the courts in *Dills* and *Adams* followed the approach taken by the lower courts in this case.

The allegedly contradictory decisions cited by the Petitioners do not conflict with the principles followed by the Second and Eleventh Circuits. In each of those cases, the courts either did not reach the issue or reached it, but had before them a statement of legislative purpose or extrinsic evidence of that purpose in the record. In not one instance did the court either hold or imply that it could take judicial notice of the interests to be served by

the particular legislation under consideration in the absence of any stated purpose or extrinsic evidence.

For example, in *National Advertising Co. v. City of Orange*, 861 F.2d 246 (9th Cir. 1988), the ordinance at issue in that case contained an express provision stating that its purpose was to "enhance aesthetic values in the City . . . . " ORANGE, CAL., MUN. CODE § 17.78.020; Record on Appeal, Volume I at 96, *National Advertising Co. v City of Orange*, 861 F.2d 246 (9th Cir. 1988). Thus, the Ninth Circuit never had to address the issue raised here because the ordinance under scrutiny contained its own statement of purpose.[5]

The decisions of the Fourth Circuit cited by Petitioners are also inapposite. In *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987), the Fourth Circuit relied on the city's assertion that it intended its ordinance to promote aesthetics and traffic safety. The

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[5] The Ninth Circuit, however, did dispose of the contention raised by Petitioners that there can be no violation of the First Amendment when an ordinance "regulate[s] both off-premises commercial and non-commercial speech equally." Pet. at 16. As the Ninth Circuit declared:

> Merely treating noncommercial and commercial speech equally is not constitutionally sufficient. The first amendment affords greater protection to noncommercial than to commercial expression. *Metromedia*, 453 U.S. at 506–07, 520, 101 S.Ct. at 2982, 2899. Regulations valid as to commercial speech may be unconstitutional as to noncommercial. *Id.* at 506-07, 101 S.Ct. at 2891-92; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 103 S.Ct. 2875, 2879, 77 L.Ed.2d 469 (1983).

National Advertising, above, 861 F.2d at 248.

Petitioners fail to note, however, that the city had supported that assertion in the district court with extrinsic evidence in the form of affidavits and records of public hearings. *See Major Media of the Southeast, Inc. v. City of Raleigh*, 621 F. Supp. 1446, 1451, 1452 n.4 (E.D.N.C. 1985), *aff'd*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987).

Similarly, in *Georgia Outdoor Advertising, Inc. v. City of Waynesville*, 833 F.2d 43, 46 (4th Cir. 1987), the plaintiffs, while challenging the city's ordinance as an unconstitutional restriction on commercial speech, admitted that one of the primary purposes of the ordinance was promotion of aesthetics. Thus, the second prong of the *Central Hudson* test was satisfied in that case through extrinsic evidence of the legislative purpose behind the challenged ordinance.

The decisions of the First, Third and Sixth Circuits cited by the Petitioners are also consistent with the decisions of the Second and Eleventh Circuits. Petitioners claim that the First Circuit took a "contradictory approach" in *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985), and *John Donnelly & Sons v. Campbell*, 639 F.2d 6 (1st Cir. 1980), *aff'd mem.*, 453 U.S. 916 (1981). *See* Pet. at 13. Petitioners, however, do not cite to any specific pages in these decisions to support that claim. A brief examination of those cases, though, reveals their assertion to be mistaken.

In *Matthews*, the First Circuit never reached the question of what governmental interest the ordinance might have been intended to serve. Instead, it found the ordinance unconstitutional on its face for discrimination against non-commercial speech in favor of commercial speech. *Matthews*, above, 764 F.2d at 59. In *John Donnelly & Sons*, the First Circuit relied expressly on the preamble of the challenged statute to determine the

governmental interests—tourism, highway safety and aesthetic values—allegedly served by it. *John Donnelly*, above, 639 F.2d at 7, 10-12. Thus, those cases are thoroughly consistent with the decisions of the courts below here.

Likewise, in *Frumer v. Cheltenham Township*, 709 F.2d 874 (3d Cir. 1983), the Third Circuit did *not* decide, as Petitioners claim, that "a municipality need not establish its governmental interest . . . by empirical data." Pet. at 13. Instead, the Third Circuit held that a municipality does not have to give a "detailed empirical showing that the regulation in issue *actually advance[s] the asserted governmental interests*." *Frumer*, above, 709 F.2d at 877-78 (emphasis added). The question in that case, therefore, was not the identity of the governmental interests the challenged regulation was designed to advance, which is the second part of the *Central Hudson* test. Rather, the issue was the showing necessary to establish the nexus between those interests and the means chosen to promote them, which is the third prong of the *Central Hudson* test.

Finally, in *Wheeler v. Comm'r of Highways of Kentucky*, 822 F.2d 586, 587 (6th Cir. 1987), the Sixth Circuit relied specifically upon the challenged billboard statute's statement of purpose to identify the governmental interest the legislature had intended the statute to serve.

Thus, there simply is no split among the courts of appeals on the issue raised by Petitioners. The courts of appeals consistently hold that a governmental entity bears the burden of proving the interests sought to be advanced by its restrictions on protected speech. Those interests can be found in a statement of legislative purpose within the statute. They can also be found in extrinsic evidence such as records of public hearings. In the absence of such evidence, however, the courts will

not speculate on those interests. Instead, they will invalidate the restrictions as unconstitutional.

CONCLUSION

Petitioners claim the decision of the Second Circuit has unfairly placed a "burden" on them. Pet. at 14. That "burden," however, is the burden this Court requires every governmental entity to satisfy when it attempts to restrict speech protected by the First Amendment. Far from "risk[ing] the very foundation of our system of jurisprudence," Pet. at 15, this approach requires governmental entities to take seriously their constitutional responsibilities in our federal system. There is no reason to change this long-standing rule. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/ MYRON D. COHEN

HUNTON & WILLIAMS
100 Park Avenue
New York, N.Y. 10017
(212) 309-1000

Attorneys for Respondent
National Advertising Company

Of Counsel:
Christopher M. Mason
Michael R. Shebelskie